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penalty for disregard of a Congressional regulation, is so evident that "a court must be blind not to see it."¹⁵

Though the purpose of the act is highly commendable, and social and economic welfare demand such regulation, it should be accomplished in a constitutional manner. The court undoubtedly reached a justified conclusion, for to permit such a policy as is contended for in the principal case would ultimately lead to a disintegration of our entire governmental scheme. In the words of the court, "Grant the validity of this law, and all that Congress would need to do hereafter in seeking to take over to its control any one of the great number of subjects of public interest . . . would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."

J. E. P.

CONTRACTS: LIFE INSURANCE: CONDITIONS ABROGATING STATUTORY RULES OF EVIDENCE—In *McCormick v. Woodmen of the World*¹ an express provision in the insurance certificate of the defendant organization provided that the presumption of death arising from an absence of seven years should not be sufficient evidence to allow recovery by the beneficiary, but that there must be satisfactory proof of death, exclusive of the presumption. In an action by the plaintiff, the sole beneficiary, whose husband had been absent more than seven years, the California Court of Appeal allowed recovery though there had been no actual proof of his death. The court held the above provision invalid: 1, because parties to a contract cannot agree to oust the court of jurisdiction; 2, it is unreasonable in that it abrogates a statutory rule² which raises a presumption of death after an absence of seven years; and 3, it is against public policy. Though the decision affirms the California law,³ and is in accord with the numerical weight of authority,⁴ it seems that the position of the courts holding this view is not warrantable either from a legal or practical point of view.

In assigning the first argument as a basis for their decisions the courts seem to have overlooked the fact that the provision in

¹⁵ No one is subject to the tax unless he has failed to comply with the regulations set forth. Also the element of knowledge is provided for by excusing those who employ a child within the age limit without knowledge and in the words of the court, "Scientists are associated with penalties, not with taxes."

¹ (May 4, 1922) 38 Cal. App. Dec. 115.

² Cal. Code Civ. Proc., §1963, subd. 26.

³ *Bennett v. Woodmen of the World* (1921) 35 Cal. App. Dec. 139, 199 Pac. 343. (Though in this case the by-law was adopted subsequently, the principles of law applied are identical with the principal case.)

⁴ *Samberg v. Knights of Modern Macabees* (1909) 158 Mich. 568, 123 N. W. 25; *National Union v. Sawyer* (1914) 42 App. Cas. D. C. 475; *Haines v. Modern Woodmen of America* (1920) 189 Ia. 651, 178 N. W. 1011; *Garrison v. Modern Woodmen of America* (1920) 178 N. W. (Neb.) 842; *Boynton v. Modern Woodmen* (1921) 181 N. W. (Minn.) 327; contra, *Steen v. Modern Woodmen* (1920) 129 N. E. (Ill.) 546.

question forms a material part of every contract of insurance,⁵ and is inserted not for the purpose of ousting the courts of jurisdiction, nor to prescribe rules of evidence as such, but as a condition precedent upon which, and only upon which, a liability is to arise. An inconsistency is also apparent in the reasoning of the courts in view of the fact that contracts of similar nature have been sustained; hence contracts requiring the testimony of an eye-witness to a death or personal injury to recover on an insurance contract have been upheld in practically all jurisdictions;⁶ similarly where parties agree that the certificate of an architect shall be conclusive evidence of the satisfactory completion of the work the courts have not hesitated in holding it valid.⁷ No better refutation for this argument can be found than the words of Professor Wigmore,⁸ that "This, however, is merely a traditional phrase repeated by imitation without reflection. It is not correct in point of fact; for such a clause in a contract does not withdraw a controversy from jurisdiction, i. e., from trial and determination of issues of law and fact. It leaves all issues of substantive law within the court's determination; it leaves there all other possible issues of fact; and it leaves there the issue of law and fact whether this specific clause was assented to without fraud or coercion. To say that it virtually ousts the court of jurisdiction is to assert something that is not true nor even substantially true."

The court's second ground finds no better support either in reason or precedent. The provision in our code⁹ that parties may waive any law intended solely for their benefit would seem to cover the question in the principal case and determine the matter conclusively. Further, the presumption of death after an unexplained absence of seven years had its origin in early English law.¹⁰ It was used merely as a rule of convenience and was adopted by our code with a view of serving the same purpose. In view of its purpose it would seem that there is nothing unreasonable in the parties' abrogating it by contract. The contention that it is unreasonable because it abrogates a statutory rule, is further rebutted by the fact that so many statutory laws, including rules of evidence,

⁵ *Valentine v. Head Camp, Pacific Jurisdiction Woodmen of the World* (1919) 180 Cal. 192, 198, 180 Pac. 2; *Conway v. Supreme Council Catholic Knights of America* (1901) 131 Cal. 437, 439, 63 Pac. 727; *Supreme Lodge of the Fraternal Brotherhood v. Price* (1915) 27 Cal. App. 607, 616, 150 Pac. 803; *Butler v. Grand Lodge* (1905) 146 Cal. 172, 79 Pac. 861.

⁶ *Becker v. Interstate Bus. Men's Acc. Assn. of Des Moines, Iowa* (1920) 265 Fed. 508; *Lundberg v. Interstate Bus. Men's Acc. Assn.* (1916) 162 Wis. 474, 156 N. W. 482, 484, Ann. Cas. 1916D 667; *Roeh v. Bus. Men's Protective Assn.* (1914) 164 Ia. 199, 145 N. W. 479, 51 L. R. A. (N. S.) 221; Ann. Cas. 1915C, 1813.

⁷ See Williston on Contracts, 1920, vol. II, § 798, and notes for collection of authorities.

⁸ 16 Illinois Law Review, at p. 95.

⁹ Cal. Civ. Code § 3513.

¹⁰ Lawson, Law of Presumptive Evidence, p. 254.

are now contracted away, that the exceptions would in effect nullify any existing rule to the contrary.¹¹

The basis for the court's last argument is public policy. In considering a matter from this point of view the "balance of convenience" must be used, and a determination made so as to effect "the greatest good for the greatest number." The provision in question is inserted in the benefit certificates to protect the organization from being victimized, and from indirect results which would require unjust payments to be made. It should be noted that the insurance is against the husband's death and not against desertion. It has been found, however, that approximately ninety per cent of the supposed "disappearance cases" are in fact cases where the member intentionally leaves home because of domestic or other difficulties, and is never seen again. Ordinarily payment to the beneficiary after an absence of seven years would be required. It would appear that under these circumstances organizations are amply justified in the insertion of such protective measures, and that permitting them is not inimical to public policy. Though recovery in a small minority of cases might be rendered difficult, in view of the fact that these organizations fill a public need and operate on a "mutual benefit" plan, it would seem that public opinion would support measures which tend to protect them from being victimized, and subjects of indirect fraud, thus enabling them to benefit a greater number.

By holding this provision invalid the courts not only ignore an express condition precedent to a liability, but by rendering a decision in favor of the insured's beneficiary, they are creating a liability on the part of the insurer that he never intended, and to which he would probably never have consented. It would seem that this judicial legislation by which the courts ignore an express provision, the very core of the liability, and enforce upon the parties a new one is more unreasonable and more against public policy than its original insertion.

J. E. P.

CORPORATIONS: SUABILITY OF A LABOR UNION AS A LEGAL ENTITY: LIABILITY OF A LABOR UNION FOR UNAUTHORIZED ACTS OF ITS MEMBERS—In 1914, three coal companies in Arkansas having a common management were operating under a wage agreement with District No. 21, United Mine Workers of America. In violation of the agreement the operators closed down, discharged the miners, and prepared to reopen on an open-shop basis. Immediately there followed an industrial war in which the conduct on both sides was reprehensible and inexcusable, with the death of several miners and much damage to property as a result. The companies then began suit under the Sherman Anti-Trust Act¹ for

¹¹ *Beeson v. Schloss* (1920) 183 Cal. 618, 622; 192 Pac. 292. See for full discussion of this whole topic Professor Wigmore's article, 16 *Illinois Law Review*, 87, 103, and cases collected therein.

¹ 26 Stat. 209, 9 Fed. Stat. Ann. 644.